BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21,869, 21,870
and 21,870-A

VALLEY VISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS TO REVIEW DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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JURISDICTIONAL STATEMENT

The petitionsto review in Case Nos. 21869 and 21870 were filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), by Valley Vision, Inc., from (1) an order of the Commission, released March 30, 1967, in which the Commission denied reconsideration of its earlier order to show cause, and (2) a decision of the Commission, released May 16, 1967, in which the Commission found that petitioner's CATV system in Placerville, California, had commenced service without giving the notice required by Section 74.1105 of the Commission's Rules, 47 CFR 74.1105, and was importing distant signals from San Francisco,

Modesto, and Chico, California, in violation of Section 74.1107 of the Rules, 47 CFR 74.1107, and ordered petitioner to cease and desist from such violations. The appeal in Case No. 21870-A was filed pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b) by Valley Vision in the Court of Appeals for the District of Columbia from the above-mentioned Commission cease and desist decision. Such appeal was transferred to this Court on September 6, 1967.

COUNTERSTATEMENT OF THE CASE

We believe that a counterstatement of the facts is necessary to provide the Court with a more complete and accurate statement of this case than has been supplied by petitioner. Additionally, respondents believe that the following general discussion of the

development and growth of community antenna television systems (CATVs) and the Commission's regulatory policies with respect thereto will be helpful to the Court in connection with its consideration of this proceeding.

1. Background

Originally, community antenna television systems (commonly called CATV systems)[1/] came into being to bring television to areas not reached by any television station and to afford multiple services to areas not already having them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, or seasonal and other changes in atmospheric conditions sometimes impair or make impossible good television reception. Where such conditions prevail, master antennas have been erected at suitable locations, usually on a mountain or other high elevation where the reception of the signals of the desired stations is strong. The signal is then brought to the community by cable or radio hops, and distributed by cable to the homes of individual

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1/ The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Sections 74.1101(a), 31 F.R. at 4570, 2 F.C.C. 2d at 801.

customers within the community.[2/] At the home, the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. (See Second Report and Order of the Commission, pars. 116, 117, 31 F.R. at 4557-8, 2 F.C.C. 2d at 771-2.)[3/] The latest estimates place the number of systems in operation at over 1,800, with some 1,600 additional systems franchised but not yet in operation, and over 2,400 applications pending in 1,200 cities. The distances which signals are taken has also greatly increased, to as much as 600 miles.

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in under-served communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities. (Second Report and

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2/ The distribution cable facilities may be supported on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the municipal government, as are franchises to engage in the business.

3/ The Second Report and Order in Docket Nos. 14895, 15233 and 15971 et al., is the Commission opinion released March 8, 1966, adopting the rules governing CATV operation.

Order, par. 117, 31 F.R. at 4558, 2 F.C.C. 2d at 771-2). Because of this growth, the Commission has been concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities, might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV can cause.

The Commission noted that Congress, in the 1962 all-channel receiver legislation, had made the judgment that the widest possible development of UHF is the best way of achieving an adequate national television service, including both commercial and educational systems (31 F.R. at 4557, 2 F.C.C. 2d at 770). It believed that since UHF development was already proceeding in at least 163 communities or area -- most of which were located within the top 100 television markets -- any halt or curtailment of the growth of UHF development caused by the distribution of signals from other areas in these communities by CATV would be particularly significant.

The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new

proposed CATV system bringing signals from beyond the Grade B contour of the original station into the Grade A service area of any station in a community in one of the largest one hundred television markets.[4/] In order to avoid disruption of existing service, the Commission permitted systems in operation on February 15, 1966, the date on which it had given public notice that new rules would be adopted, to continue their existing operations.

Section 74.1107 of the Rules was adopted to effectuate these determinations. The portions of that rule pertinent to this proceeding are summarized as follows: Subsection (a) contains the general standard that no CATV shall extend the signal of any television station beyond its Grade B service area into the Grade A service area of another station located in one of the top 100 television markets until such extension is shown in an evidentiary hearing before the Commission to be consistent with the public interest. Subsection (d) exempts from this hearing requirement those CATV systems which had commenced service on or before February 15, 1966.

4/ A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, at 215-216 n. 12, 225 F.2d 511, at 515-516 n. 12 (1955).

Section 74 1105 requires that notification of intention to commence service (or to add a new distant signal) be served on the Commission, all licensees and permittees within whose Grade B contour the system will operate, and certain other persons. Service cannot be commenced until thirty days after this notice is served. The purpose of this rule is to give interested persons an opportunity to lodge with the Commission objections or requests for special relief, or for licensees to request carriage and/or nonduplication (see Sections 74.1103 and 74.1109).

2. The Present Proceeding

Petitioner is the owner of a community antenna television system located at Placerville, California. Placerville, a community of approximately 5,000 persons, is located about 40 miles from Sacramento and about 60 miles from Stockton, California. Sacramento-Stockton is ranked as the 27th television market. Placerville is within the predicted Grade A contours of three Sacramento stations. On September 30, 1966, a date subsequent to the adoption of the Commission's CATV rules, petitioner commenced operation of its system. The system serves approximately 450 subscribers and carries the following television signals: KCRA-TV, KXTV, KOVR, and KVIE, Sacramento, California; KGO-TV, KTUV, KPIX, KRON-TV, and KQED, San Francisco, California; KLOC-TV, Modesto, California; and KHSL, Chico, California (R. 68-69).

On November 1, 1966, following the receipt of information which indicated that petitioner was operating its system in violation of the Commission's rules, the Commission addressed a letter of inquiry to petitioner (R. 15-16). Petitioner responded by letter dated November 8, 1966 (R. 17-19). It admitted commencing operation without giving the notice required by Section 74.1105 of the Commission's rules, and also admitted carrying the signals of distant television signals on its system. Petitioner asserted, however, that the Commission did not have jurisdiction to regulate its CATV system.

Nonetheless, on January 11, 1967, petitioner filed a request, pursuant to Section 74.1109 of the Commission's Rules, for a waiver of Sections 74.1105 and 74.1107(a) (R. 238-287). Petitioner recited that its previous position regarding the Commission's lack of authority over CATV was based upon the advice of Robert B. Cooper, President of Valley Vision, Inc. It further stated that Mr. Cooper had subsequently been replaced and that the waiver request was filed upon the advice of counsel.

As grounds for a waiver of the rules, petitioner claimed that off-the-air service in Placerville was unsatisfactory; that its CATV system would not have an adverse effect on the existing Sacramento market or on the development of UHF television in either the Sacramento or Stockton television markets; and that any curtailment of petitioner's system would impair its economic viability. Kelly Broadcasting Company, licensee of television

station KCRA-TV, Sacramento, and Great Western Broadcasting Corporation, licensee of television station KXTV, Sacramento, opposed petitioner's waiver request.

On February 17, 1967, the Commission issued an Order to Show Cause, directing petitioner to show cause why it should not be ordered to cease and desist from violating the Commission's rules (R. 20-24).[5/] In view of the particular circumstances of the case, however, [described in paragraph 4 of the Commission's Order to Show Cause] the Commission departed from its announced policy of refusing to act on waiver petitions until a CATV system brings itself into compliance with the rules[6/] and, rather than requiring a thirty day cessation of operation before granting relief, permitted petitioner to carry the local Sacramento-Stockton signals pending further order by the Commission.

Petitioner filed a petition for reconsideration of the show cause order on March 20, 1967 (R. 48-55). This was denied by Commission Order of March 30, 1967 (R. 66). A hearing was held on April 6, 7, and 10, 1967. On this latter date the record was closed and certified to the Commission for decision. The parties then filed proposed findings of fact and conclusions of law.[7/]

5/ Section 312 of the Communications Act provides for the issuance of cease and desist orders, 47 U.S.C. 312.

6/ See Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, 811 (1966)

7/ Petitioner filed a pleading entitled "Skeleton Proposed Findings of Fact and Conclusions of Law" (R. 217-226). Its request for an extension of time in which to file its pleading was denied by the Hearing Examiner on April 10, 1967. An appeal was taken to the Commission which affirmed the Examiner's ruling on April 19, 1967 (R. 180).

Upon consideration of the hearing record and the pleadings filed by the parties, the Commission released a Decision on May 16, 1967, ordering petitioner to cease and desist from violating Sections 74.1105 and 74.1107(a) of the Commission's rules, 47 CFR 74.1105, 74.1107(a) (R. 181-189). The Commission found that petitioner did not, prior to commencing service on September 30, 1966, give the notice prescribed by Section 74.1105 to the licensees and permittees of the television stations within whose predicted Grade B contours it was operating. It found that petitioner's CATV system operates within the predicted Grade A contour of television stations located in the Sacramento-Stockton television market, that this market is the 27th largest in the United States, that by bringing the signals of television stations from San Francisco, Modesto, and Chico, California, into Placerville, petitioner was extending these signals beyond their Grade B contours, and that petitioner had neither requested nor obtained Commission approval to extend these signals, in violation of Section 74.1107(a) of the Commission's rules.

In addition, the Commission rejected petitioner's argument that its system did not come within the predicted Grade A contour of Sacramento television stations KXTV and KOVR. The Commission held that petitioner's engineering showing was inadmissible and irrelevant since only the standard predicted method of contour prediction was contemplated by the language of Section 74.1107(a). Accordingly, petitioner was ordered to cease and desist from

operating its CATV system except for the carriage of the four Sacramento television stations. As to these stations, the order was conditioned upon petitioner's compliance with Section 74.1103 of the Commission's rules, 47 CFR 74.1103, for a period of thirty days so that the notice provisions of Section 74.1105 could be enforced.[8/]

On May 29, 1967, petitioner filed in this Court petitions to review the Commission's Order denying reconsideration of the show cause order (Case No. 21869), and the final Commission cease and desist order (Case No. 21870). Also on this date, petitioner filed a request for an interlocutory stay of the Commission's decision. Respondents filed a motion to dismiss the petitions to review on June 12, 1967. On June 29, 1967, this Court granted petitioner's stay request and continued respondents' motion to dismiss until the cases are heard on the merits. Respondents' request for reconsideration of these actions was denied on August 1, 1967. Case Nos. 21869 and 21870 were consolidated by order of this Court on August 9, 1967.

On June 15, 1967, petitioner filed a Notice of Appeal from the Commission's cease and desist order in the Court of Appeals for the District of Columbia Circuit. Petitioner then moved to dismiss that appeal on July 19, 1967, on the basis of this Court's order of June 29, 1967. The District of Columbia Circuit did not dismiss the appeal, choosing instead to transfer the case sua sponte because an appeal had first been filed in the Ninth Circuit. (The transferred appeal is Case No. 21870-A in this Court.)

8/ The force and effect of this decision was stayed first by petitioner's appeal and then by this Court's order of June 29, 1967; therefore petitioner has never complied with the notice requirement of Section 74.1105.

QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether this Court has jurisdiction to review the above-captioned cases.

2. Whether the Communications Act gives the Commission the authority it has asserted over community antenna television systems.

3. Whether the Commission has the authority under Section 312 of the Communications Act to issue cease and desist orders against CATV systems.

4. Whether the Commission's cease and desist proceeding was conducted in a fair manner.

SUMMARY OF ARGUMENT

I.

This Court is without jurisdiction to review the Commission's actions in this proceeding. As to Case No. 21,870, Section 402(b)(7) of the Communications Act gives the United States Court of Appeals for the District of Columbia exclusive jurisdiction to review cease and desist orders issued by the Commission. The language of the statute and the legislative history of the 1952 amendments to the Communications Act make it clear that a specific and exclusive path of judicial review of cease and desist orders was being provided so as to avoid confusion. The question of whether it is proper to issue a cease and desist order against a CATV system is one for the court with exclusive jurisdiction, the District of Columbia Court of Appeals. This view is supported by the District of Columbia Circuit's order transferring the appeal taken there to this Court.

As to Case No. 21,869, the Commission's show cause order and the denial of reconsideration thereof were interlocutory and procedural in nature and, therefore, not subject to judicial review under 28 U.S.C. §2342. These orders did not compel or forbid any conduct. If they are reviewable at all, they are part of the cease and desist proceeding which is only reviewable in the United States Court of Appeals for the District of Columbia Circuit. Under these circumstances, respondents respectfully suggest the transfer of this proceeding to the District of Columbia Circuit.

II.

The Commission has determined that the indiscriminate and uncontrolled growth of CATV places in jeopardy individual broadcast stations and the basic television allocations structure established by the Communications Act, and thus "the public interest in the larger and more effective use of radio" (Section 303(g)). The essential validity of this conclusion, the reason underlying the Commission's assertion of jurisdiction over CATV, has recently been upheld in Buckeye Cablevision, Inc. v. Federal Communications Commission, __ F.2d __ (C.A.D.C. 1967). But for nearly a decade, the Commission has recognized that CATV systems operating in the service area of broadcast stations can have an adverse economic impact on those stations. CATV and TV Repeater Services, 26 F.C.C. 403, 421-22 (1959). And see Carter Mountain Transmission Corp., 32 F.C.C. 459, affirmed, Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963), where the Court of Appeals held that conditions imposed upon the grant of an application to construct a microwave service, designed to minimize the adverse impact of a CATV system on a local broadcast station, were entirely reasonable limitations under the public interest standard of the Communications Act. The Commission's rules were designed to strike a balance between the interests of the CATV systems and of the broadcasters so as to serve the overriding public interest in the advancement of a nationwide broadcasting system.

CATVs are engaged in interstate communication by wire or radio within the meaning of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), the Commission clearly has the authority (47 U.S.C. 154(i) and 303(r)) to prescribe by rule the conditions under which a television signal may be extended through the medium of a CATV system in order to prevent the frustration of the Congressional scheme of television regulation, in particular, the mandate of 47 U.S.C., sections 307(b) and 303(s). The Communications Act grants to the Commission authority to regulate all forms of interstate communication by wire and radio. Thus, petitioners' contention that the statute requires that the Commission only concern itself with the regulation of common carriers and the licensing of radio stations is, we submit, too narrow a construction of the Congressional mandate. The Communications Act has been judicially construed as granting the Commission expansive powers in its regulation of a dynamic, rapidly changing industry. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940); Philadelphia Broadcasting Co. v. Federal Communications Commission, 359 F.2d 282 (C.A.D.C. 1966). Where an operation such as CATV, which we submit is unquestionably comprehended by the Communications Act as an interstate communication,

has raised the specter of frustration of enforcement of the Act, it can be dealt with under the Commission's broad rulemaking powers. American Trucking Association v. United States, 344 U.S. 298 (1953). Any prior positions taken by the Commission in this regard do not estop its assertion of jurisdiction over CATV. We point out that the Commission has not previously stated in unequivocal terms that it did not have such jurisdiction. See Second Report and Order, 2 F.C.C. 2d at 732-734. Even if past rulings had been as represented by the petitioners, which we do not concede, the Commission is not estopped from correcting a ruling of law which appears to be clearly erroneous. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (C.A.D.C. 1963); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965).

III.

The Commission clearly has authority to issue cease and desist orders against CATV systems which have violated valid regulations. The plain language of Section 312(b) of the Communications Act states that a cease and desist order can be issued against "any person." Nothing in the legislative history of Section 312 points to a different conclusion. Clear court precedent supports this view of the statute. Booth American Company v. Federal Communications Commission, 374 F.2d 311 (C.A.D.C., 1967); Buckeye Cablevision, Inc. v. Federal Communications Commission, C.A.D.C., Case No. 20,274, decided June 30, 1967. Furthermore, CATV is an integral part of the broadcast distribution system, and the

regulations which the Commission adopted relative to CATV are within the framework of the national broadcast allocation scheme. Violation of these regulations is manifestly subject to the cease and desist power of the Commission.

IV.

The Commission's conduct of the cease and desist proceeding here was clearly fair. The Commission properly refused to consider petitioner's proferred engineering measurements which purportedly show the lack of any rule violation because Section 74.1107 of the Rules calls for a predicted method of plotting station contours. This was done for the sake of definiteness and ease of administration. When petitioner comes into compliance with Section 74.1107, it can make its engineering showing at the hearing that rule provides, but not before. Booth American Company v. Federal Communications Commission, supra; Buckeye Cablevision, Inc. v. Federal Communications Commission, supra. Petitioner's allegation that it did not receive the 30 day notice of hearing required by Section 312(c) of the Act is erroneous because petitioner has computed the days from the wrong date. The allegation that the 7 days allowed for filing proposed findings of fact and conclusions of law was too short is not well founded. The Commission clearly set out the reasons for expeditious action in the show cause order. Finally, petitioner's argument concerning the propriety of the Commission's Broadcast Bureau being a participant

in the hearing below is without merit. Since the burden of proof is on the Commission in a cease and desist proceeding, some arm of the Commission must participate, and the Broadcast Bureau's Hearing Division does so for administrative convenience at the request of the Commission's CATV Task Force.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO REVIEW CASE NOS. 21869 and 21870 BECAUSE EXCLUSIVE JURISDICTION IS VESTED IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This Court is without jurisdiction to review the Commission's action in Case Nos. 21,869 and 21,870. In regard to the latter case, Section 402(b)(7) of the Communications Act gives the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review cease and desist orders issued by the Commission. Insofar as petitioner seeks review in Case No. 21,869 of the show cause order which led to the cease and desist order, this is interlocutory in nature and only reviewable upon review of the final agency action.

On June 12, 1967, we filed a motion to dismiss Valley Vision's petitions to review based on the foregoing allegations. This Court's order of June 29, 1967, continued consideration of our motion until the cases are heard on the merits. Subsequently, the Court of Appeals for the District of Columbia supported our view but transferred the appeal taken in that Circuit to this Court "in deference to §2112(a) [28 U.S.C. §2112(a)] and the need for avoiding unseemly conflict." We respectfully renew our arguments on this point.

A. The Petition For Review In Case No. 21,870 Should Be Dismissed Because This Court Has No Jurisdiction To Review Commission Cease And Desist Orders.

Section 402(a) of the Act, 47 U.S.C. 402(a), provides that proceedings to "enjoin, set aside, annul, or suspend any order of

the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. sections 2341-2351]." Section 402(b) of the Act specifies that:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> . . .
>
> (7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

This language is specific, and therefore petitioner can seek judicial review only by way of an appeal filed under section 402(b)(7) in the District of Columbia Circuit.[9/]

There is no doubt that these two sections specify mutual clusive methods for reviewing Commission actions. Rhode Island Television Corporation v. Federal Communications Commission, 116 U.S. App. D.C. 40, 320 F.2d 762 (1963); Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), cert. denied 361 U.S. 813 (1959). The legislative history of section 402(b)(7) bears this out. When Congress amended the Communications Act in 1952 to authorize the Commission to use cease and desist orders, section 402(b) was amended to provide that

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9/ Petitioner did file such an appeal. It was transferred to this Court pursuant to 28 U.S.C. 2112(a) (see discussion, infra).

these orders would be reviewable only in the Court of Appeals for the District of Columbia. P.L. 554, approved July 1952, 66 Stat. 711. The Senate Report accompanying the 1952 amendments points out:

> Subsection (b) attempts a more precise and comprehensive definition of the jurisdiction of the United States Court of Appeals for the District of Columbia in cases appealed from the Commission. S. Rept. No. 44, 82nd Cong., 1st Sess., p. 11.

And the House Report similarly notes:

> As is the case under section 402 of the present law, subsection (b) specifies certain types of orders and decisions in the case of which judicial review may be had only in the United States Court of Appeals for the District of Columbia and subsection (a) deals with review of other orders and decisions of the Commission . . . . H. Rept. No. 1750, 82nd Cong., 1st Sess., p. 16.

The revision of section 402(b) made more precise and comprehensive the jurisdiction of the United States Court of Appeals for the District of Columbia, and was undertaken because under the old law "confusion and controversy have arisen concerning what decisions and orders of the Commission might become the subject of judicial review and in what court." S. Rept., supra, p. 11. Thus, the same Congress which enacted the authority of the Commission to issue cease and desist orders in section 312(b) of the Act, 47 U.S.C. section 312(b), also provided a specific and exclusive path of judicial review of such orders, in order to avoid confusion.

The claim that section 402(b)(7) does not apply because the cease and desist order was improperly issued against a non-

licensee begs the question.[10/] The fact is that the Commission, purporting to act under section 312(b), conducted a show cause proceeding pursuant to that section and issued a cease and desist order. While the legality of that action is one of the central issues on appeal, it can be reached only by a Court which has jurisdiction to review the proceeding below since such jurisdiction is a threshold consideration. We believe that the plain language of the statute, the underlying Congressional intent and the cases contruing section 402 all make clear that jurisdiction lies not with this Court but with the Court of Appeals for the District of Columbia Circuit.

Finally, in support of our view, we invite the Court's attention to the order of the Court of Appeals for that Circuit (a copy of which is attached hereto) transferring the appeal taken in that Circuit to this Court (Case No. 21,870-A). In so doing, the District of Columbia Court stated:

> We do not dismiss but yield sua sponte to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. §2112(a). We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to §312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See Buckeye Cablevision, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, ___ F.2d ___ (No. 20,274, decided June 30, 1967); contra, Southwestern Cable Co. v. United States, ___ F.2d ___ (No. 21,183, 9th Cir., decided April 28, 1967). Under §402(b)(7) the Court

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10/ Both Sections 312(b) and 402(b)(7) are in terms not of "licensees" but of "persons."

> of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.
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> To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to §2112(a) and the need for avoiding unseemly conflict, and does not signal that we are receding from our view that the case properly belongs in the District of Columbia Circuit. [Footnotes omitted]

B. The Petition For Review In Case No. 21,869 Should Be Dismissed Because The Order Appealed From Is Interlocutory In Nature And Is Encompassed Within Case No. 21,870.

The Petition for Review in Case No. 21,869 seeks review of the Commission order which denied petitioner's Petition for Reconsideration of the Commission's order directing Valley Vision to show cause why its CATV system at Placerville, California should not be ordered to cease and desist from carrying certain television signals.

The Commission's show cause order and the order denying reconsideration (R. 20-24, 66) were interlocutory and procedural in nature, and hence not subject to judicial review under 28 U.S.C. section 2342 which grants the Courts of Appeal jurisdiction to review only "final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." (Emphasis added). See Bethesda-Chevy Chase Broadcasting Co. v. Federal Communications Commission, ___ F.2d ___ C.A.D.C., decided September 28, 1967; Southland Industries v. Federal Communications Commission, 99 F.2d 117 (1938). A show cause order is analogous to a hearing order, and does not directly impose either obligations or penalties.

Cf. Federal Power Commission v. Edison Co., 304 U.S. 375 (1938). Since the show cause order itself and the order denying reconsideration thereof did not compel or forbid any conduct, they lack the requisite impact necessary for judicial review. Bethesda-Chevy Chase Broadcasting Co. v. Federal Communications Commission, supra; Amerada Petroleum Corporation v. Federal Power Commission, 285 F.2d 737 (10th Cir., 1960); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir., 1954), cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990. See generally Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

These orders are reviewable only upon the review of the final agency action to which they are related, [11/] and are thus "ancillary" to the cease and desist order, the final agency action in this case. Accordingly, review is proper only in the United States Court of Appeals for the District of Columbia Circuit. Helena TV, Inc. v. Federal Communications Commission, 269 F.2d 30 (9th Cir.,1959); Tomah-Mauston Broadcasting Co. v. Federal Communications Commission, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962).

In light of the above circumstances, we respectfully suggest that this Court transfer the above-captioned appeals to the United States Court of Appeals for the District of Columbia.

11/ The Administrative Procedure Act, 5 U.S.C. 704, provides in part that "[a]ny preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action."

II. THE COMMUNICATIONS ACT GIVES THE COMMISSION THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY ANTENNA TELEVISION SYSTEMS.

Petitioner's chief contention is that the Commission has no jurisdiction over CATV systems. Its argument is divided into three parts: that the Commission's assertion of jurisdiction over CATV is inconsistent with prior statements by the Commission that it had no such jurisdiction; that the sections of the Communications Act relied on by the Commission do not confer jurisdiction over CATV because of the separate common carrier and radio functions of the Commission; and that the Commission has no authority to make rules regulating CATV because it can only regulate licensees under Title III of the Communications Act.

This Court held in Southwestern Cable Co. v. United States, 378 F.2d 118 (1967), that the Commission's authority "was exercisable only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency. In reaching its decision, the Court relied largely on language in Regents v. Carroll, 338 U.S. 586 (1950), wherein the Supreme Court observed that the Commission's "powers center around the grant of licenses."

More recently, the Court of Appeals for the District of Columbia Circuit upheld the Commission's jurisdiction over CATV. Buckeye Cablevision, Inc. v. Federal Communications Commission,

___ F.2d ___, decided June 30, 1967. The Court concluded that CATV, "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

We have requested the Supreme Court to review the Southwestern decision, contending that it erroneously decides a new and important question of law and that it is in conflict with the decision of another circuit. In this brief we attempt to show that the Commission's assertion of jurisdiction is not wrong in light of past statements, that the Regents case is not dispositive of the jurisdictional question, and that the Communications Act, as the Court in Buckeye found, confers on the Commission the power to regulate CATVs.

A. Prior Positions Taken By The Commission Do Not Estop Its Present Assertion Of Jurisdiction Over CATV.

Petitioner urges (pet. Br. 15-21) that the Commission has previously denied that it has jurisdiction over CATV and that it has unsuccessfully sought to obtain such jurisdiction from Congress. The Commission fully discussed this contention in the Second Report and Order, 2 F.C.C. 2d at 732-734. That discussion makes clear that the Commission had not previously stated in unequivocal terms that it did not have jurisdiction over CATV. What the Commission did earlier was to disclaim plenary power, under section 303(a), (b), (f), (g), (i), and (r) to "regulate any and all enterprises which happen to be connected with one of the many

aspects of communications"--a power which is not claimed here. However, it assumed (without deciding) that CATVs are within the scope of section 3(a) and also found it unnecessary to pass on the question of its authority to regulate them directly because of adverse effect on broadcasting.[12/]

More, important, even if past rulings had been as represented by petitioner, the Commission is not estopped from correcting a ruling of law which appears to be clearly erroneous. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359, 369 (C.A.D.C.), cert. den. 375 U.S. 951; Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672; United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404-406.[13/] Indeed, in United Gas Improvement, the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority, Public Service Commission of New York v. Federal Power Commission, 287 F.2d 143 (C.A.D.C. 1960).

Finally, the Commission's recent request to Congress to amend the Act did not constitute an admission that jurisdiction

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12/ See CATV and TV Repeater Services, supra, at 428-431.
13/ See also American Trucking Associations, Inc., et al. v. Atchison T. & S. F. Ry Co., 387 U.S. 397 (1967); FTC v. Dean Foods Co., 384 U.S. 597, 608-611 (1966); Calbeck v. Travellers Ins. Co., 370 U.S. 114, 127n. 15 (1962); Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183 (1957).

over CATV did not exist. As the Commission stated in the Second Report and Order (2 F.C.C. 2d at 787):

> There are four areas which we shall urge to the Congress as particularly warranting its attention:
>
> (i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in the field. (See notice, par. 31, 1 FCC 2d at p. 465.) 14/

In considering the Commission's request, the House Committee on Interstate and Foreign Commerce reported out H.R. 13286, a bill to amend the Communications Act to give the Commission

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14/ See also Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 89th Cong., 2d Sess., on H.R. 14921, p. 1035:

"Senator MAGNUSON. That is the question I wanted to ask. You people honestly feel that you need some congressional reassurance of your authority.

"Mr. HYDE. We think it would be helpful to us.

"Senator MAGNUSON. I do not mean helpful to you. I mean legal authority.

"Mr. HYDE. No, sir.

"Senator MAGNUSON. I am talking legally. Do you need somthing in addition to what you now have?

"Mr. HYDE. No, sir. We think we are acting within the authority granted to us to regulate interstate communications.

"Senator MAGNUSON. You have the authority?

"Mr. HYDE. We do. But you will remember that the authority under which we are acting was granted before there was any such thing as community antenna system, and naturally Congress might very well wish to give us more direction in this area.

"Senator MAGNUSON. Well, it is my understanding--your proposal is for Congress to, if they saw fit, to give you some direction--

"Mr. HYDE. That is right, sir.

"Senator MAGNUSON. Rather than give you more legal authority

"Mr. HYDE. We think that we are correct in our assertion of legal authority to act."

authority to issue rules and regulations with respect to CATV. H. Rept. No. 1635, on H.R. 13286, 89th Cong., 2d Sess. While the Report specifically refused to agree or disagree with the Commission's conclusions as to its jurisdiction, its significance is that Congress, so far as it has given any indication of its views, has moved to confirm the Commission's power and has, with full knowledge of the exercise of jurisdiction, taken no action to change the Commission's course.

B. Regents v. Carroll, Which Involved A Contractual Dispute Between A Broadcast Licensee And A Third Party, Does Not Resolve The Question Of The Commission's Jurisdiction Over An Entity Engaged In Interstate Communication By Wire, An Activity Expressly Subject To The Commission's Regulatory Authority.

In its Southwestern opinion, this Court stated that its decision was guided by the language of the Supreme Court in Regents v. Carroll, that "the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license that the Commission may apply to enforce its decisions" 338 U.S. at 597-599. In that case the Commission granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the Commission had invalidated the contract.

The issue in the case was stated thusly by the Court:

"whether in the light of the Supremacy Clause of the Constitution a court state/may enter a judgment that grants respondents a recovery on the very stock purchase contract that justified the Commission's refusal of a license."[15/] As it had on earlier occasions, the Court noted that the Communications Act does not give the Commission the authority to adjudicate private controversies. It found that the Commission had no power to "act as a bankruptcy court" or to determine the validity of contracts between licensees and others. Id. 602. And accordingly it concluded that the state court's judgment did not contravene the Supremacy Clause.

It is in this context that the discussion of the Commission's powers took place. Unlike CATVs, the other party to the contract in Regents was not a person engaged in interstate communication by wire and radio. As we show in the following section of our brief, the Act applies to all such communications and the Commission was expressly created to regulate such activity. For this reason we respectfully urge that Regents v. Carroll, relied upon by petitioner (Pet. Br. 27-28), is not controlling, and that the better view of that case is the one taken by the District of Columbia Circuit in Buckeye:

> In Carroll, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" around its licensing power which does not encompass abridgment of contracts between

15/ See e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138.

> licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at the time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority, [47 U.S.C. 312(b)(c)] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which Carroll may still be viable since we think that in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire scheme. [Footnote omitted.]

The CATV industry is indisputably part of the nation's communications system. This is a field in which Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation." It did so because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943).

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry. See also Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), and Philadelphia Broadcasting Co. v. Federal

Communications Commission, 359 F.2d 282, 284 (C.A.D.C. 1966).

We respectfully urge that the jurisdictional question should not be resolved simply on the basis of the earlier quoted language from Regents. In the following section of our brief we discuss those sections of the Communications Act on which the Commission relies for its claimed jurisdiction and which were accepted by the District of Columbia Circuit. We believe that construed in light of National Broadcasting Co. and Pottsville these statutory provisions confer on the agency the jurisdiction asserted.

C. Since CATV Systems Are Engaged In Interstate Communication By Wire Or Radio, They Fall Within The Ambit Of The Commission's Regulatory Authority.

The Communications Act directs the Commission to provide "a rapid, efficient, Nation-wide and worldwide wire and radio communications service * * *," 47 U.S.C. §151. It applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio. * * *" 47 U.S.C. §152. To achieve the goals of the Act, the Commission is directed inter alia, to establish "areas or zones to be served by any [broadcast] station," 47 U.S.C. §303(h), to issue broadcast licenses to "provide a fair, efficient, and equitable distribution of radio service" to the states and communities of the United States, 47 U.S.C. §307(b), and to promulgate rules and regulations to effectuate its responsibilities,

47 U.S.C. §§154(i), 303(f), (r).

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the service offered, it is clear that CATVs are engaged in communication by wire within the meaning of the Act. And see also 47 U.S.C. 153(b) which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission."

It is clear also that CATVs engage in interstate transmissions under Section 3(e). This is so because the transmission of a television station is in interstate commerce, Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936) And the extension of such an interstate communication by a CATV is part of the interstate transmission, even though the extension itself be entirely within one State. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra; Idaho Microwave, Inc. v. Federal Communications Commission, 352 F.2d 729 (C.A.D.C. 1965); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (C.A. 6, 1962), cert. den. 371 U.S. 820.

CATVs are clearly a link in the transmission of television signals to the public. They are elaborate distribution systems whereby signals may be carried hundreds of miles beyond their point of orig and delivered to subscribers far beyond the normal range or service area of the stations involved. This finding is in accord with court holdings in which the question has been considered. Thus in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C.S.D. N.Y. 1966), affirmed Fortnightly v. United Artists, 377 F.2d 872 (C.A. 2, 1967) an action for infringement of copyright, the Court stated:

> The term "community antenna," as used by defendants for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs--operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas. 255 F. Supp. at 180.

Likewise, the Court of Appeals in the Buckeye case described the system there as one which "receives programs which originate outside the state and retransmits them by cable to its customers." (Slip Op. p. 8, emphasis added.)[16]

16/ See also Idaho Microwave, Inc. v. Federal Communications Commission, supra, and Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 517 (C.A.D.C. 1955).

Thus, in practical effect as well as in legal contemplation, CATV systems are a part of the transmission of the television signal to the public. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), the Commission clearly has the authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).[17/]

Petitioner contends (Pet. Br. 21-26) that the Commission has two principal and separate functions--to regulate communications common carriers and to license radio stations--and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate. The Communications Act expressly states that its provisions "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all

17/ This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3 (1962). Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Report.

persons engaged within the United States in such communication or such transmission of energy by radio * * *," 47 U.S.C. §152(a). Congress did not provide that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to imply such an intent. If Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

Moreover, Congress stated in Section 1 of the Act, 47 U.S.C. 151, that its intent was not only to "centralize authority heretofore granted" to other agencies but also to grant "additional authority with respect to interstate commerce in wire and radio communication." This change in the law was for the purpose of "securing a more effective execution" of national communications policy. Thus the avowed intendment of the Act as expressly stated in Section 1 negates petitioner's argument that the only accomplishment of the legislation was to consolidate the common carrier functions of the Interstate Commerce Commission and the licensing functions of the Federal Radio Commission. Under the circumstances, petitioner's resort to legislative history[18/] to establish a different view is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 278 U.S. 269 (1929); Elm City Broadcasting Co. v. United States, 235 F.2d 811 (C.A.D.C. 1956).

But even if the statute were not so clear, the legislative

18/ Valley Vision's Br. pp. 21-24.

history on which petitioner relies is not persuasive. The bill as finally enacted did not include the sharp functional division of the Commission's powers as petitioner argues. Instead, the Act is a comprehensive scheme for the regulation of interstate communication and constituted "the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication. The primary purpose of the Act was to create a commission 'to regulate all forms of communication * * *'" H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3.355 H.S. at 104 n. 14. The legislative history, like the language of the Act itself, demonstrates that Congress intended not merely to effect a reshuffling of two regulatory activities to place them under one authority for administrative purposes, but rather, to establish a cohesiveness and uniformity in the handling of all interstate communications matters which had until that time been lacking.

In affirming the Commission's jurisdiction over CATVs, the Court of Appeals for the District of Columbia relied on the expressed objectives of the Communications Act and the specific mandate given therein to the Commission. In addition, it acknowledged that soundness of the Commission's conclusion that further unregulated growth of CATV represents a substantial economic threat to licensed television stations and to the allocations system established by the Commission. And finally it pointed to the substantial body of case law, both in the communications field and in other areas, which recognizes the implied authority of the expert agency to deal with

aligned activities affecting the regulatory scheme and grants to it sufficient latitude to cope with new developments in the industry it was established to regulate.[19] The Southwestern opinion did not address itself to any of these considerations since the Court in that case felt that Regents v. Carroll was dispositive. We respectfully urge that with due regard for the language in that case the weight of authority, both statutory and judicial, supports the Commission's assertion of jurisdiction.

19/ See e.g., National Broadcasting Co. v. United States, supra; American Trucking Assoc. v. United States, 344 U.S. 298 (1953); Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153 (C.A.D.C. 1967).

III. THE COMMISSION CLEARLY HAS AUTHORITY TO ISSUE CEASE AND DESIST ORDERS AGAINST CATV SYSTEMS WHICH HAVE VIOLATED VALID REGULATIONS.

Petitioner advances the argument (Pet. Br. 29-37) that the Commission does not possess the power to issue cease and desist orders against non-licensees of the Commission. This argument is predicated almost entirely on language found in the Congressional Committee Reports which accompanied the 1952 amendments to the Communications Act. However, to conclude from this language that the Commission's Section 312(b) cease and desist power is limited to licensees is to ignore the plain language of the statute, the import of cases decided thereunder, and the basic scheme of the Act.

The extensive quotes from the Committee Reports set out by petitioner (Pet Br. 30-34) all speak to the principal reason for granting cease and desist power to the Commission, i.e., that revocation was then the only administrative sanction available against licensees and a less harsh remedy was needed. But nowhere in the Committee Reports is it stated that cease and desist orders were intended to be issued only against licensees. In fact, the plain language of the statute runs contrary to petitioner's assertions. Thus, Section 312(b) begins "Where any person . . .", and Section 312(c) refers to "licensee, permittee, or person." It is a basic rule of statutory construction that where the language of the statute is clear and unambiguous, it is presumed that the legislature meant what it said. 82 C.J.S. Statutes, §316(b); United States v. Goldenberg, 168 U.S. 95 (1897); Jeanese, Inc. v. United States, 227 F. Supp. 304 (N.D. Cal., 1964), reversed on other grounds, 341 F.2d

502 (C.A. 9, 1965). It is also presumed that every word is intended for some purpose. 82 C.J.S. Statutes, §316(b); Pacific Gas and Electric Co. v. Securities and Exchange Commission, 139 F.2d 298 (C.A. 9, 1943), affirmed 324 U.S. 826, rehearing denied 324 U.S. 890 (1945). The word "person" appears together with "licensee" in Section 312(b) and obviously means something different. We therefore submit that on the basis of the statute alone petitioner's argument must be rejected.

Further support for our contention is found in those cease and desist orders against non-licensees which have been appealed to the courts. Most to the point are two recent decisions of the Court of Appeals for the District of Columbia Circuit wherein the Commission's issuance of cease and desist orders against CATV system operators for rule violations was affirmed. Booth American Company v. Federal Communications Commission, 374 F.2d 311 (C.A. D.C., 1967); Buckeye Cablevision, Inc. v. Federal Communications Commission, Case No 20,274, decided June 30, 1967.[20/] Even the case cited by petitioner (Pet. Br. 34) supports the Commission's view, C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660 (C.A. D.C, 1957). In that case, the Commission had issued a cease and desist order against a non-licensee (an unlicensed booster station), and the court reversed the Commission. But the ground for reversal was not that the non-licensee could

20/ Southwestern Cable v. United States of America and Federal Communications Commission, 378 F.2d 118 (C.A. 9, 1967) cited by petitioner (Pet. Br. 28 n.25) did not involve the issuance of a Section 312(b) order.

not be reached by a cease and desist order;[21] rather, it was that the Commission had discretion under the statute as to whether such an order should issue even where the rule violation is clear (the Commission had held that it had no discretion). The portion of the concurring opinion quoted by petitioner also concerns the question of the Commission's discretion to issue an order and does not, as petitioner appears to allege, decide the question of the Commission's power to issue cease and desist orders against non-licensees.

If, as we assert, supra, a CATV operator is subject to the Act, he is clearly a "person" for Section 312(b) purposes. CATV is an integral part of the broadcasting distribution system, and the Commission, pursuant to its "authority to establish areas or zones to be served by any station" (§303(h)) and its duty to "provide a fair, efficient, and equitable distribution of radio service" (§307(b)), has promulgated rules to promote the integration of CATV service with television broadcast stations so as to serve the overriding public interest in the advancement of a nationwide broadcasting system. The administrative sanction of

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21/ It is noteworthy that in the court's discussion of the Commission's authority over booster stations, a footnote reference was made to "Can Community Antenna TV Be Enjoined?", 20 Albany Law Review 69 (1956), 246 F.2d at 663 n.4. This article discusses the various possible methods of stopping a CATV from using a station's programs. One method mentioned is the use of a Section 312(b) cease and desist order in the event that the Commission asserts jurisdiction over CATV.

a cease and desist order is provided in Part III of the Act to insure compliance with regulations adopted thereunder. As we have stated above, the CATV rules have been adopted pursuant to Part III of the Act to promote the equitable allocation scheme which the Commission is directed to maintain. The power to issue cease and desist orders is manifestly a part of the statutory framework for enforcing such rules. Booth American Company v. Federal Communications Commission, supra; Buckeye Cablevision, Inc. v. Federal Communications Commission supra.

IV. NOTHING IN THE COMMISSION'S CONDUCT OF THE CEASE AND DESIST PROCEEDING HEREIN WAS UNFAIR TO PETITIONER OR DENIED IT DUE PROCESS.

Petitioner's final argument (Pet. Br. 37-42) is that the Commission's cease and desist proceeding was "arbitrary, capricious, and denied petitioner procedural process." This sweeping indictment of the Commission's action actually consists of five sub-arguments. We will show below that none of these is meritorious.

Petitioner's chief assertion is that the Commission erred in failing to consider its engineering evidence, consisting of measurment data, which purportedly shows that Placerville is not located within the Grade A contours of any commercial television station situated in a top 100 market, in particular, Sacramento. Petitioner asserts that the acceptance of such a showing would mean that its CATV system is not subject to the hearing requirements of the distant signal rule. However, as the Commission's opinion thoroughly explains (R. 183-185), Section 74.1107 contemplates use of the

"predicted" Grade A contour as its standard. In its Second Report and Order, the Commission explained the reason for its selection of the predicted rather than a measured contour, stating (2 F.C.C. 2d at 783 n. 63):

> "For clarification . . . [w]e have employed the grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. . . ."

The "predicted" Grade A contour is computed by using the method set out in Sections 73.684(c) and (d) of the Commission's Rules, 47 CFR 73.684(c) and (d), while petitioner's proferred showing is a "supplemental showing" as referred to in Section 73.684(f), 47 CFR 73.684(f). As indicated in the just quoted material, it is quite clear that the Commission intended the former method to be used for purposes of Section 74.1107. On this basis, petitioner's Placerville CATV system is within the Grade A contours of the Sacramento stations and the distant signal rule is applicable. If, in fact, petitioner can make a valid "supplemental showing" that the Sacramento Grade A contours do not cover Placerville, this

is a relevant factor to be considered in the context of a waiver request.

In the same vein, petitioner asserts that the Commission erred in refusing, at the time of the hearing on the show cause order, to hear any evidence on petitioner's waiver request. It is clear, however, that consideration of such evidence has not been barred but has simply been deferred until the hearing called for by Section 74.1107. It is well-settled that the Commission has wide discretion to control the scope of its proceedings and to establish the priorities as to the manner in which its business will be conducted. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Communications Commission v. Taft Schreiber, 381 U.S. 279 (1965). The Commission has made a policy judgment, applicable to all systems similarly situated, that compliance with the rules must be obtained before requests for relief are considered. Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, 810-811 (1966). The considerations underlying this judgment are manifestly reasonable. The Commission found that such a course was dictated by requirements of orderly procedure, fairness to those systems which comply with the rules, and out of consideration for potential subscribers whose service would be substantially disrupted if it was ultimately found that the importation of distant signals was contrary to the public interest. Clearly, the Commission's judgment involves no abuse of discretion. The Court of Appeals for the District of Columbia has squarely so held.

Booth American Company v. Federal Communications Commission, supra; Buckeye Cablevision, Inc. v. Federal Communications Commission, supra.

Petitioner alleges that it had only 25 days advance notice of the show cause hearing whereas Section 312(c) of the Act requires 30 days notice. The short answer to this contention is that petitioner has simply counted the days from the wrong date. The statute states that the hearing date must be no less than thirty days from the "receipt" of the show cause order. The certified mail receipts show that the show cause order and the simultaneously released order designating the time and place of hearing were received by petitioner on March 1 and February 20, 1967, respectively. The hearing date as originally set was April 18, and it was later advanced to April 3. Both dates obviously comply with the 30 day requirement. Petitioner erroneously computes the days from March 8, the date of the order moving the hearing date to April 3. This is patently wrong.

Petitioner complains that it was only given 7 days after the conclusion of the hearing within which to file proposed findings of fact and conclusions of law. It stated before the Commission that the time was too short and that it required the 20 days normally provided in Section 1.263 of the Commission's Rules, 47 CFR 1.263. However, this was not the normal case. The Commission stated in the show cause order (R. 22):

> In the Second Report and Order we indicated that we would act expeditiously in the event of a violation of Section 74.1107 of the Rules. Since the public

> interest requires that the situation in Placerville be resolved as soon as possible, the Commission finds that due and timely execution of its functions imperatively and unavoidably require that the Examiner certify the record in this matter, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within seven (7) calendar days after the date the record was closed.

The Commission reiterated this conclusion in its order denying petitioner's appeal from the hearing examiner's refusal to extend the time (R. 180). It was in light of the policy considerations in the Second Report and Order that the Commission considered the need for expeditious adjudication in this proceeding (2 F.C.C. 2d at 781). At the time the show cause order in regard to petitioner's operation was adopted, the information before the Commission indicated that petitioner had commenced operation of a CATV system in one of the top 100 television markets after February 15, 1966, and was extending the signals of certain stations beyond their Grade B contours by transmitting such signals to its subscribers without first requesting or obtaining Commission permission. Petitioner gave no indication that it would voluntarily cease the proscribed operation until Commission consent was obtained. The Commission properly concluded that it could not permit this case to go through the regular hearing process and still accomplish its objective of preventing CATV systems carrying distant signals from becoming entrenched before taking effective action. This determination was a reasonable exercise of the Commission's discretion.

Finally, petitioner alleges that it was somehow error for the Commission's Broadcast Bureau to participate in the hearing. In a cease and desist proceeding, the burden of proof is on the Commission. Thus some arm of the Commission must participate as a party. It is therefore unnecessary for the appropriate arm to file a motion to intervene; it need only note an appearance. The question of which arm of the Commission is the proper participant is simply a matter of internal Commission procedure. One of the functions of the Commission's Broadcast Bureau is to participate in "hearings involving applications, rule making, and other matters which pertain to the radio broadcast services." Section 0.71(d) of the Rules, 47 CFR 0.71(d). As a matter of administrative convenience, the CATV Task Force requests the Broadcast Bureau, which has a special hearing division, to represent it (and the Commission) at hearings such as the one in this case. This argument appears singularly without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court has no jurisdiction over this proceeding and should therefore transfer it to the Court of Appeals for the District of Columbia, but in the event that this Court takes jurisdiction, the Commission's assertion of jurisdiction over community antenna television systems and the Commission's issuance of a cease and desist order against a CATV system for violation of valid regulations should be affirmed.

Respectfully submitted,

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October 27, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stuart F. Feldstein

ATTACHMENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,063

VALLEY VISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appellant's Motion to Dismiss

Decided September 6, 1967

Messrs. Lauren A. Colby and *Gennaro Caliendo* were on appellant's motion to dismiss.

Messrs. Henry Geller, General Counsel, Federal Communications Commission, *John H. Conlin*, Associate General Counsel, and *Robert D. Hadl*, Counsel, Federal Communications Commission, were on appellee's answer to the motion to dismiss. *Mrs. Leonore G. Ehrig*, Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT, and LEVENTHAL, *Circuit Judges*.

PER CURIAM: The Federal Communications Commission ordered appellant to cease and desist from the continued carriage of "distant signals" on its CATV system in Placerville, California. Prior to noting an appeal in this Court under § 402(b) of the Communications Act,[1] appellant

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[1] 48 Stat. 926 (1934), as amended, 47 U.S.C. § 402(a) (1964).

instituted an appeal in the Court of Appeals for the Ninth Circuit under § 402(a) challenging the same decision of the Commission. The Ninth Circuit has issued an interlocutory injunction staying the effectiveness of the Commission's order. Appellant now requests that we dismiss his appeal so that he may prosecute the entire matter in the Ninth Circuit.

We do not dismiss but yield *sua sponte* to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. § 2112(a).[2] We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,274, decided June 30, 1967); *contra, Southwestern Cable Co.* v. *United States*, ___ F.2d ___ (No. 21,183, 9th Cir., decided April 28, 1967). Under § 402(b)(7) the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.[3]

To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to § 2112(a) and the need for avoiding unseemly conflict, and does not signal that we

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[2] See *Eastern Air Lines, Inc.* v. *CAB*, 122 U.S. App. D.C. 375, 354 F.2d 507 (1965); *Ball* v. *NLRB*, 299 F.2d 683 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

[3] See, *e.g.*, *Tomah-Mauston Broadcasting Co.* v. *FCC*, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962); *Functional Music, Inc.* v. *FCC*, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959). *Cf. Helena TV, Inc.* v. *FCC*, 269 F.2d 30 (9th Cir. 1959).

are receding from our view that the case properly belongs in the District of Columbia Circuit.

It is so Ordered.

Senior Circuit Judge Miller did not participate in the foregoing opinion.